

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs May 15, 2007 Session

HARVEY WEBSTER v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. 2003-B-851 Cheryl Blackburn, Judge

No. M2006-00886-CCA-R3-PC - Filed June 27, 2007

The petitioner, Harvey Webster, appeals as of right the Davidson County Criminal Court's denial of his petition for post-conviction relief challenging his guilty pleas to especially aggravated kidnapping and aggravated robbery. Additionally, he appeals the effective sentence of twenty-five years as a Range I, standard offender received as a result of his guilty pleas from which the trial court granted a delayed appeal pursuant to Tennessee Code Annotated section 40-30-113. Following our review, we affirm the judgment of the trial court.

Tenn. R. App. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed

D. KELLY THOMAS, JR. J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and ROBERT W. WEDEMEYER, JJ., joined.

Paula Ogle Blair, Nashville, Tennessee, for appellant, Harvey Webster.

Robert E. Cooper, Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Victor S. "Torry" Johnson, III, District Attorney General; Bret Gunn, Assistant District Attorney General, Nashville, Tennessee, for appellee, State of Tennessee.

OPINION

The petitioner was initially indicted in case number 2003-B-851 for one count of especially aggravated kidnapping, one count of aggravated kidnapping and two counts of aggravated robbery. Additionally, he was indicted in case number 2003-C-1726 for one count of aggravated burglary and, in case number 2003-A-169, for one count of theft of property valued at over five hundred dollars but less than one thousand dollars. On the day of trial, April 17, 2004, the defendant entered guilty pleas to one count of especially aggravated kidnapping, one count of aggravated robbery, one count of aggravated burglary and one count of theft of property valued at over five hundred dollars. The petitioner pled open with no agreement as to sentence except that all sentences would be served

concurrently with one another. At the August 27, 2004, sentencing hearing, the trial court imposed an effective sentence of twenty-five years for all the offenses to be served concurrently with a previously unserved conviction for aggravated burglary for which the petitioner was on probation when the present offense were committed.¹ No appeal of the sentence was taken.

On July 1, 2005, the petitioner filed a pro se post-conviction petition alleging that his guilty pleas were not made knowingly, understandingly and voluntarily due to the ineffective assistance of trial counsel. After the appointment of counsel and appropriate amendment to the petition, the trial court held an evidentiary hearing regarding the allegations of the petition. Specifically, the petitioner alleged that trial counsel failed to interview witnesses, failed to inform him of the rule regarding independent corroboration of accomplice testimony, failed to inform him that the weapon from the offenses had been recovered, failed to challenge the photographic lineup through which he was identified by the victim and that all of these deficiencies rendered his guilty plea involuntary and unknowing. Relative to sentencing, he alleged that trial counsel failed to inform him of the proper sentence he would face by turning down the state's initial plea offer, failed to propose mitigating circumstances at the sentencing hearing and failed to challenge the sentencing determination pursuant to Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004). He also claimed that trial counsel failed to appeal the sentencing determination as he had directed counsel to do.

The petitioner testified at the evidentiary hearing that he would not have entered his guilty pleas if trial counsel had discussed with him the rule regarding independent corroboration of accomplice testimony. He also complained that trial counsel initially told him that the gun involved in the offenses had not been recovered but later told him that it had been. He testified that trial counsel failed to seek independent fingerprint analysis of the gun. The main crux of his complaint with trial counsel's performance centered around the sentence received as a result of the guilty pleas. He claimed that trial counsel told him he would not get more than fifteen years by pleading open and allowing the trial court to impose sentence. He stated that trial counsel was surprised by the twenty-five year sentence and told him that he would file an appeal. He also testified that he had attempted to contact trial counsel on numerous occasions regarding the appeal but stated that trial counsel never responded to his inquiries. He admitted at the evidentiary hearing that he was satisfied with trial counsel's performance but became unhappy "once I got sentenced." He also acknowledged to the court that the trial judge had inquired extensively regarding his understanding of the plea and possible sentences, but that he never told the trial court that he did not understand the terms and consequences of his guilty pleas.

Trial counsel testified that he never discussed the accomplice corroboration rule with the petitioner because the state had corroborative evidence for use at trial in the form of the petitioner's handprint, an identification made by the victim, and the petitioner's statement to the police. He

¹ Although not the subject of this post-conviction petition, the trial court imposed Range I sentences of six years and two years, respectively, for the aggravated burglary and theft of property valued at over five hundred dollars convictions. In case number 2003-B-851, the trial court imposed a twenty-five year sentence for especially aggravated kidnapping and the twelve year sentence for aggravated robbery; these are the subject of this post-conviction petition and delayed appeal.

acknowledged that he did not tell the petitioner about a codefendant's girlfriend being a possible witness against him because the state never put her on a witness list. He stated that the petitioner knew that his codefendants would be potential witnesses against him and even probable witnesses after both codefendants entered into plea agreements with the state. He denied telling the petitioner that fifteen years was the most he would face with an open plea and explained that the petitioner had never indicated a desire to accept the state's offer of a fifteen year total effective sentence but maintained a desire to go to trial up until the day of trial. He recalled that the petitioner decided to plea on the day of trial and that, by that time, the offer had been withdrawn as to the length of the sentences with the state only agreeing that the sentences would be served concurrently. He could not recall any conversation with the petitioner about appealing the sentence and could not explain why he had failed to execute a waiver of appeal pursuant to Tennessee Rules of Criminal Procedure, Rule 37(d)(2).

Based upon the evidence presented at the hearing, the trial court found that the petitioner had failed to prove his allegations of ineffective assistance of counsel by clear and convincing evidence with respect to the voluntariness of this guilty plea and denied the petition for post-conviction relief. However, the court did find that the record failed to show that the petitioner "knew of his right to appeal and intended to waive it" and granted a delayed appeal of the sentence. The petitioner now appeals from both rulings.

ANALYSIS

Initially, we note that the petitioner is essentially raising two separate appeals in this single appeal before our court. Tennessee Code Annotated section 40-30-113 and Tennessee Supreme Court Rule 28 section 9 provide for the grant of a delayed appeal through a post-conviction action. Contrary to case law prior to its enactment, the rule does not require a stay of the post-conviction action when the delayed appeal is granted by the trial court pursuant to Rule 28 section 9(d)(1)(a); but, instead, the rule allows for the review by this court of any delayed appeal issues in addition to a review of any other action taken by the trial court regarding the allegations of the post-conviction petition. Therefore, in this case, this court has jurisdiction to review both the delayed appeal issue, as well as the trial court's denial of post-conviction relief. State v. Ben Thomas Dowlen, No. M2003-00508-CCA-R3-CD, 2004 WL 1621687, slip op. at *2 (Tenn. Crim. App. July 20, 2004), perm. app. denied (Tenn. Nov. 15, 2004); State v. Billy Jackson Coffelt, M2005-01723-CCA-DAC-CD, 2006 WL 2310597, slip op. at *2 (Tenn. Crim. App. Aug. 8, 2006); but see Gibson v. State, 7 S.W.3d 47, 50 (Tenn. Crim. App. 1998) (prior to Rule 28 section 9(d)(1)(a), proper procedure when granting a delayed appeal was to dismiss without prejudice any remaining collateral attack of the conviction).

Ineffective Assistance of Counsel Claim

The burden in a post-conviction proceeding is on the petitioner to prove his grounds for relief by clear and convincing evidence. Tenn. Code Ann. §40-30-110(f).² On appeal, we are bound by the trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456 (Tenn. 2001). Because they relate to mixed questions of law and fact, we review the trial court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457.

Under the Sixth Amendment to the United States Constitution, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); see Lockart v. Fretwell, 506 U.S. 364, 368-372, 113 S. Ct. 838, 842-44 (1993). In other words, a showing that counsel's performance falls below a reasonable standard is not enough; rather, the petitioner must also show that but for the substandard performance, “the result of the proceeding would have been different.” Strickland, 466 U.S. at 694, 104 S. Ct. 2068. The Strickland standard has been applied to the right to counsel under Article I, Section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

A petitioner will only prevail on a claim of ineffective assistance of counsel after satisfying both prongs of the Strickland test. See Henley v. State, 960 S.W.2d 572, 580 (Tenn. 1997). The performance prong requires a petitioner raising a claim of ineffectiveness to show that the counsel's representation fell below an objective standard of reasonableness or “outside the wide range of professionally competent assistance.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court decided that attorneys should be held to the general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases. The prejudice prong requires a petitioner to demonstrate that “there is a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different.” Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. “A reasonable probability means a probability sufficient to undermine confidence in the outcome.” Id. Failure to satisfy either prong results in the denial of relief. Id. at 697, 104 S. Ct. at 2069.

The post-conviction court found that the petitioner had failed to prove his allegations of ineffective assistance of counsel by clear and convincing proof. Our review leads to the same conclusion. The allegations regarding ineffective communication or explanation by trial counsel

² Contrary to the petitioner's assertion in his brief that the burden of proof in a post-conviction evidentiary hearing is “by a preponderance of the evidence,” the Post-Conviction Procedure Act of 1995 provides that the burden of proof upon a petitioner to prove the allegations of fact contained in a post-conviction petition is by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f).

were refuted by the transcript of the guilty plea submission hearing. The submission transcript reveals that the trial court advised the petitioner regarding the elements of the offenses and possible punishments. When asked if he understood and whether trial counsel had explained the same to the petitioner, the petitioner indicated both that he understood and that trial counsel had explained the elements of the offenses and possible punishments to him prior to entering the pleas. Relative to the petitioner's allegation that trial counsel failed to interview a codefendant's girlfriend who he claims was a state's witness, the post-conviction court found no proof that the individual was ever named as a witness; as such, it was reasonable for trial counsel not to have interviewed the individual. Additionally, this court notes that the petitioner presented no proof at the evidentiary hearing regarding what, if any, evidence the individual may have testified to at trial or how such testimony would have affected his decision to enter the guilty pleas. The post-conviction court also found that there was no deficient performance by trial counsel's alleged failure to explain the corroboration of accomplice testimony rule because there was ample evidence for use by the state to corroborate the codefendants' testimony had the case proceeded to trial with their testimony. Regarding the alleged failure to challenge the photographic line-up, trial counsel testified that he saw no valid basis to challenge the line-up, and the petitioner failed to present any proof to support this allegation at the evidentiary hearing. Finally, regarding trial counsel's failure to obtain independent fingerprint analysis of the gun, trial counsel testified that no fingerprints were found on the weapon, so he saw no reason to seek additional testing.

In summary, the post-conviction court found that trial counsel's performance did not fall below an objective standard of reasonableness so as to render the guilty pleas involuntary and entitle the petitioner to a withdrawal of the guilty pleas. We conclude that the evidence in the record does not preponderate against the trial court's findings and that the trial court properly denied the petition for post-conviction relief.

Delayed Appeal of Sentence

As discussed previously, in ruling on the petition for post-conviction relief, the trial court found that the petitioner had shown sufficiently that he was deprived of his right to file an appeal by counsel's failure to either file an appeal or a waiver of an appeal and granted the petitioner a delayed appeal of his sentence pursuant to Tennessee Code Annotated § 40-30-113. See also Tennessee Supreme Court Rule 28 § 9(d)(1)(a). An appellate court's review of sentencing is de novo on the record with a presumption that the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401(d) (2003). As the Sentencing Commission Comments to this section note, on appeal the burden is on the defendant to show that the sentence is improper. If the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, this court may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

However, “the presumption of correctness which accompanies the trial court’s action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.” State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In this respect, for the purpose of meaningful appellate review,

[T]he trial court must place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor found, and articulate how the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. Tenn. Code Ann. § 40-35-210(f) (1990).

State v. Jones, 883 S.W.2d 597, 599 (Tenn. 1994).

Pursuant to the 1989 Sentencing Act, the presumptive sentence to be imposed for a Class A felony such as especially aggravated kidnapping was the midpoint in the range. Tenn. Code Ann. § 40-35-210(c)(2003). However, for aggravated robbery, a Class B felony, the presumptive sentence was the minimum in the range. Id. The 1989 Sentencing Act also provided that, procedurally, the trial court was to increase the sentence within the range based on the existence of enhancement factors and, then, reduce the sentence as appropriate for any mitigating factors. Id. at (d) and (e). The weight to be afforded an existing factor was left to the trial court’s discretion so long as it complied with the purposes and principles of the 1989 Sentencing Act and the court’s findings were adequately supported by the record. Id. § 40-35-210 (2003), Sentencing Commission Comments; State v. Moss, 727 S.W.2d 229, 237 (Tenn. 1986); see Ashby, 823 S.W.2d at 169.

In conducting its de novo review, the appellate court must consider (1) the evidence, if any, received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating or statutory enhancement factors, (6) any statement that the defendant made on his own behalf, and (7) the potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210 (2006); see Ashby, 823 S.W.2d at 168; Moss, 727 S.W.2d at 236-37.

At the petitioner’s sentencing hearing,³ the trial court found the following enhancement factors applicable to the petitioner’s especially aggravated kidnapping and aggravated robbery convictions:

- (2) The defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range;
- (14) The felony was committed while on any of the following forms of release status if such release is from a prior felony conviction:

³ The sentencing hearing in this case was held on August 27, 2004, less than three months after the United States Supreme Court’s release of their opinion in Blakely. At the time of sentencing, Tennessee courts were in flux regarding Blakely’s application to our sentencing scheme. However, any confusion regarding Blakely’s application was clarified by the recent release of Cunningham v. California, 127 S. Ct. 856 (2007) and the subsequent grant of certiorari vacating our supreme court’s judgment in Gomez v. Tennessee, 127 S. Ct. 1209 (2007).

...

(C) Probation;

(21) The defendant was adjudicated to have committed a delinquent act or acts as a juvenile that would constitute a felony if committed by an adult;

Tenn. Code Ann. § 40-35-114(2), (14)(C), and (21). Based upon these enhancement factors and an absence of mitigating factors, the court sentenced the defendant to the maximum sentences of twenty-five years and twelve years in prison for the especially aggravated kidnapping and aggravated robbery convictions.

On appeal, the petitioner concedes that enhancement factors (2) and (21) could be applied in light of the United States Supreme Court's opinion in Blakely that exempts proof regarding a defendant's criminal history from the requirement that facts used to enhance a sentence must be found by a jury beyond a reasonable doubt. See also, Cunningham v. California, 127 S. Ct. 856, 868 (2007); Apprendi v. New Jersey, 530 U.S. 466, 490 120 S. Ct. 2348, 2362-63 (2000). However, he argues that the trial court afforded those two factors too much weight in its determination of the appropriate sentences and did not give appropriate consideration to the presence of mitigating factors. The petitioner also argues that enhancement factor (14) should not have been applied because it violates the principles enunciated in Blakely. The state argues that all of the enhancement factors were applied appropriately, but that even assuming 14(C) should not have been applied under Blakely, the weight of the remaining factors would render its application harmless. We conclude that the presence of enhancement factors (2) and (21) and the absence of mitigating factors are sufficient to affirm the sentences imposed by the trial court. Therefore, we need not address the Blakely issue raised by the petitioner.

As previously discussed, the trial court found enhancement factors (2), (14)(C) and (21) applicable to the petitioner's convictions. Regarding mitigating factors, the trial court commented that "I see none in this particular case." The petitioner argues that the trial court should have considered as mitigation that "the defendant played a minor role in the commission of the offense," that the victim was unharmed, and that the petitioner did not use a weapon in the commission of the offense. Tenn. Code Ann. § 40-35-113(4) and (13). The state argues that the petitioner failed to present any proof at the post-conviction hearing to support the application of these factors and that "[c]ertainly nothing in the record pertaining to sentencing indicates that the [petitioner] played a minor role in the commission of the offense or that no weapon was used." The statement of facts given at the guilty plea submission hearing reflects that the petitioner and two other individuals approached a man under the pretense of asking for a cigarette. Instead they kidnapped him at gunpoint, forcing him to drive around town for several hours while attempting to obtain money from various automated teller machines and finally from inside a bank branch office where they were ultimately apprehended. Regarding the aggravated robbery conviction, the assistant district attorney stated that the petitioner and another individual robbed the victim at gunpoint on the street in broad daylight. The petitioner did not object to the statement of facts nor did he present any mitigating evidence at either the sentencing hearing. In fact, when asked by the trial court if the statement of facts were generally true, the petitioner replied affirmatively. Based upon our review of the record,

we agree with the state’s argument that there is no proof to support the application of the petitioner’s proposed mitigating factors and conclude that the trial court correctly declined to find any applicable.

Regarding the petitioner’s argument that the trial court afforded the enhancement factors too much weight, this court has previously held that “[t]he mere number of existing enhancement factors is not relevant—the important consideration [is] the weight to be given each factor in light of its relevance to the defendant’s personal circumstances and background and the circumstances surrounding his criminal conduct.” State v. Hayes, 899 S.W.2d 175, 186 (Tenn. Crim. App. 1995) (citing Moss, 727 S.W.2d at 238). In this case, the trial court gave considerable weight to enhancement factors (2) and (21) in its determination to impose the maximum sentence for each offense. Notably, the trial court found applicable enhancement factor 14(C) but stated that “even though I’m finding fourteen, I’m not going to give it much weight at all.” Our review of the record supports the trial court’s application of factors (2) and (21), as well as the weight the trial court afforded them. Therefore, we conclude that the lack of mitigating factors and the presence of these factors support affirming the trial court’s imposition of sentences.

CONCLUSION

We conclude that the trial court properly denied the petition for post-conviction relief. We further conclude that the record supports the trial court’s imposition of an effective sentence of twenty-five years. Therefore, the judgment of the trial court is affirmed.

D. KELLY THOMAS, JR., JUDGE